

14-001-5553



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 30 2014

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable Barbara Boxer
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510-6175

Dear Chairman Boxer:

Thank you for the opportunity to respond to the questions for the record following the September 8, 2014, hearing entitled, "Examining the Strategy for Achieving the Goal of the New Voluntary Chesapeake Bay Watershed Agreement." The attached document responds to the questions. I hope that this information is useful to you and the members of the committee.

If you have any further questions, please contact me or your staff may call Sven-Erik Kaiser in my office at (202) 566-2753 or kaiser.sven-erik@epa.gov.

Sincerely,

A handwritten signature in black ink, which appears to read "Laura Vaught", is written over the typed name.

Laura Vaught
Associate Administrator

Attachment

SEPW Water and Wildlife Subcommittee Hearing
September 8, 2014
Questions for the Record and Draft Responses

Vitter 1: The U.S. Environmental Protection Agency (EPA) has previously promised members of Congress and the American public that it would develop a cost-benefit analysis for the Chesapeake Bay Total Maximum Daily Load (TMDL). To date, however, no such analysis has been provided by EPA. What explains EPA's failure to provide a cost-benefit analysis for the Chesapeake Bay TMDL? Doesn't this failure affect EPA's credibility amongst those counties and stakeholders who are required to alter their land management practices in order to comply with the TMDL?

Response: The EPA is in the process of completing an effort to estimate both the benefits and costs of the Bay jurisdictions' work to attain water quality standards through implementation of the Chesapeake Bay Total Maximum Daily Load (TMDL).

Vitter 2: In 2009, the Chesapeake Bay Foundation and other plaintiffs sued EPA, claiming that progress under the Chesapeake 2000 Agreement was too slow, and that the voluntary goals in the Agreement were in fact mandatory duties under the Clean Water Act. In other words, rather than a mutual commitment to work together on Chesapeake Bay restoration issues, the lawsuit painted the Chesapeake 2000 Agreement as containing inflexible standards which bound the Chesapeake states to a nonnegotiable mandate.

Instead of defending the voluntary nature of the Chesapeake 2000 Agreement, EPA entered into a settlement agreement with the plaintiffs which obligated the agency to develop the Bay TMDL. As Peyton Robertson with NOAA previously indicated, the Bay TMDL "fundamentally altered the nature" of the Chesapeake Bay Program because "[y]ou can't reasonably argue that it is a voluntary approach anymore."

Given this history, and the purported voluntary nature of the 2014 Chesapeake Bay Watershed Agreement, several questions arise:

Vitter 2a. By entering into the 2014 Chesapeake Bay Watershed Agreement, have the states inadvertently laid the groundwork for a future lawsuit against EPA over the alleged failure to accomplish the Agreement's goals in a timely manner?

Response. The EPA does not believe that that 2014 Chesapeake Bay Watershed Agreement (Agreement) provides a basis for a lawsuit against the United States over the alleged failure to accomplish the Agreement's goals in a timely manner. The Agreement is a voluntary undertaking by the Bay partners to achieve an environmentally and economically sustainable Chesapeake Bay Watershed. It does not establish any enforceable legal obligations on the part of its signatories.

This is evident in the terms of the Agreement itself at page 16 (the Affirmation page upon which each agency signed the agreement): "this Agreement is voluntary and subject to the availability of appropriated funds. This Agreement is not a contract or an assistance agreement. We [the signatories including EPA] also understand that this Agreement does not pre-empt, supersede or override any other law or regulation applicable to each signatory."

One of the requirements to bring a lawsuit against the United States is the waiver of sovereign immunity by the United States. This voluntary Agreement does not provide any such waiver.

Vitter 2b. If litigation occurs which claims that the 2014 Chesapeake Bay Watershed Agreement creates mandatory duties for EPA and the states, will EPA defend the voluntary nature of the Agreement?

Response: As noted above, the EPA does not believe the Agreement provides any basis for such litigation. However, if a lawsuit asserting such claims were filed, the EPA, working with the Department of Justice, would evaluate the lawsuit and its claims and respond in an appropriate manner.

Vitter 2c. Do you agree that there is a lag time between implementing conservation measures and observing local water quality improvements, and that the environmental improvements we are seeing in the Chesapeake Bay today are the result of voluntary efforts initiated several years ago?

Response: Yes, there is evidence from both local stream and river water quality and groundwater monitoring data, analyzed by the U.S. Geological Survey and university scientists, that there are lag times between implementation and responses of both voluntary and state mandated conservation practices.

Vitter 3. Environmental literacy is a major component of the 2014 Chesapeake Bay Watershed Agreement. According to the Agreement:

"Each participating Bay jurisdiction should develop a comprehensive and systemic approach to environmental literacy for all students in the region that includes policies, practices and voluntary metrics that support the environmental literacy Goals and Outcomes of this Agreement."

Does EPA expect that environmental literacy curricula will also include a discussion of how private property rights serve as a backbone to the Chesapeake region's economy?

Response: The Education Workgroup of the Chesapeake Bay Program's Stewardship Goal Implementation Team is currently developing a management strategy for the Agreement's environmental literacy planning outcome. Management strategies, due no later than June 2015, will outline the means for accomplishing each outcome. The development of each management strategy is a collaborative effort of the goal team and/or workgroup including self-identified signatory partners with input from stakeholders. The Education Workgroup currently includes representatives from the National Park Service, the National Oceanic and Atmospheric Administration, the Chesapeake Bay Trust, the Chesapeake Bay Foundation, and other state, local and nongovernmental experts. Although the EPA does not disagree that private property rights serve as a backbone to the region's economy, it is premature to speculate about what exactly will be included in the environmental literacy curricula.